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Nos. 73-784 and 73-785

In the

Supreme Court of the United States

OCTOBER TERM, 1973

CITY OF CHICAGO, RICHARD J. DALEY, and FRED B. ROTI, et al., Members of the City Council of the City of Chicago, et al.,

Petitioners,

vs.

DOROTHY GAUTREAUX, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

The "Questions Presented" and "Statement of the Case" are misleadingly presented in the petition for a writ of certiorari. We therefore begin with those two sections and then respond ("Argument") to the three reasons advanced for granting the writ.

QUESTION PRESENTED

Whether, after long and frustrating non-compliance with a remedial public housing desegregation order,* a district court may enter a declaratory judgment that (until further order of the court) a state law giving a city council veto power over a local housing authority's proposed public housing sites should be inapplicable to the authority's proposed sites, where the evidence shows,

(1) The council had refused to act on proposed sites notwithstanding many were suitable for public housing purposes and were selected by the authority to enable it to comply with the court's desegregation order,

(2) No explanation for the council's refusal to act was given except that, as stated by one alderman, a majority of the council could not be obtained to "put that many housing units in white neighborhoods," and

(3) The council's refusal to act was preventing the housing authority from implementing the district court's desegregation order.

STATEMENT OF THE CASE

Relevant background appears in decisions reported at 296 F.Supp. 907; 304 F.Supp. 736; 436 F.2d 306; 448 F.2d 731; 332 F.Supp. 366 and 457 F. 2d 124.** The order of the district court which is the subject of the petition is reported at 342 F.Supp. 827; the affirmance by the Court of Appeals is at 480 F.2d 210.

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*"Since, [1969, the district court's] orders have been ignored and his efforts frustrated." *Gautreaux* v. *Romney*, 457 F.2d 124, 140 (7th Cir. 1972) (dissenting opinion).

** An extensive summary of the case is given in the dissenting opinion, 457 F.2d at 129-32.

A. Submission of Sites to the City Council

1. In 1969 the district court determined that the defendant Chicago Housing Authority ("CHA") was intentionally discriminating on racial grounds in the selection of public housing sites. 296 F.Supp. 907 (Appendix C to the petition.) Its opinion directed the parties to formulate a comprehensive plan to "remedy the past effects of CHA's unconstitutional site selection . . ." 296 F.Supp. at 914; A41.*

2. Later in 1969 the district court entered a judgment order, 304 F.Supp. 736 (Appendix D to the petition), which among other things ordered CHA to,

> "use its best efforts to increase the supply of Dwelling Units as rapidly as possible . . ." 304 F.Supp. at 741; A52.

The first 700 new units were to be located in predominantly white neighborhoods (the "General Public Housing Area"): no more than one-fourth of additional dwelling units could be located in predominantly black neigh-

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* Contrary to petitioners' statement (p. 4) that the district court eliminated from consideration a separate CHA program for housing the elderly, the court considered much evidence concerning the elderly program and concluded:

> "Therefore, the circumstances surrounding the choice of sites for elderly housing tend to prove a purpose to perpetuate racial separation rather than to refute it." 296 F.Supp. at 912; A36.

Contrary also to petitioners' implication that the racial discrimination finding was based "without more" on statistics (p. 4), and to then disingenuous reference to "naked statistical argument" (p. 17), the district court considered much testimonial evidence which established plaintiffs' right to judgment "either considered alone or in combination with the statistics." 296 F.Supp. at 913; A39.

borhoods ("Limited Public Housing Area"). 304 F.Supp. at 738; A46-47.*

3. A year passed during which CHA submitted no sites for more dwelling units to the Chicago City Council, as required by Illinois law.** Pursuant to the "best efforts" provision of the 1969 order, the district court thereupon ordered CHA to submit sites for 1500 dwelling units to the city council.*** The order was affirmed on appeal. 436 F.2d 306, cert. denied, 402 U.S. 922.

4. CHA then complied and in March 1971 submitted 275 proposed sites to the city council, 235 of which (intended to accommodate approximately 1450 dwelling units) were located in the General Public Housing Area. Pl. Ex. No. 1, ¶1.****

B. Refusal of the Council to Act

1. The 275 sites were referred to a council committee, Pl. Ex. No. 1, ¶2, CHA having requested the referral and an early committee meeting because of "the urgency of this matter . . ." Pl. Ex. No. 2. The request from CHA's Executive Director went on:

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*The 700 unit provision "matches" (though reduced by 50%) the provision of the order that allowed CHA to proceed with 1458 units already planned for the Limited Public Housing Area. See 304 F.Supp. at 738; A46.

**Ill. Rev. Stat. ch. 67½, §9. The law applies only to Chicago.

***1500 dwelling units was the amount of CHA's then current "reservation" from the defendant Department of Housing and Urban Development ("HUD") which was also held liable for the discriminatory site selection in Chicago. See 448 F.2d 731.

****The 40 sites in the Limited Public Housing Area would accommodate approximately 300 units. Pl. Ex. 2. Virtually all (38) of these sites received prompt city council approval. Pl. Ex. 8.

> "The urgency I refer to is, of course, the dire need for additional housing for Chicago's families of low income. And affirmative, prompt action by the City Council in connection with these sites is a prerequisite to construction by CHA for additional housing to meet that need.
>
> Moreover, Judge Richard B. Austin has ruled that the placement of family public housing in past years was discriminatory and ordered that such pattern be reversed. The authority's current site program will implement that order." *Ibid.*

2. During June 1971 the committee held hearings on 43 of the 235 sites in the General Public Housing Area, approved 12 and disapproved 31. Pl. Ex. No. 1, ¶3. It also approved 32 additional sites in the General Public Housing Area proposed by persons other than CHA. Tr. 190-93. Later the same month the 44 sites were approved by the city council. Pl. Ex. No. 1, ¶6.

3. Following June 1971 the committee neither held hearings nor otherwise considered any of the remaining 192 sites CHA had submitted (Pl. Ex. No. 1, ¶5; Tr. 425), and the city council itself neither approved nor considered any of the remaining sites.

4. A supplemental complaint was then filed in February 1972, which added the city and the aldermen as parties defendant and sought a declaratory judgment that the effect of the operation of the state law giving the council its veto power over CHA sites was to deny plaintiffs relief to which they were entitled under the 1969 judgment order and to prevent the district court from vindicating plaintiffs' constitutional rights.* After answers were filed

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*The supplemental complaint is reproduced as Appendix A to this brief.

a hearing on the supplemental complaint and answers was held in April 1972.

5. At the hearing no evidence was offered to explain why neither the city council nor its committee had considered the remaining CHA sites. The only alderman called as witness by the city said that he had not discussed with his fellow aldermen why no hearings had been held. Tr. 302. Another alderman said that he could give no opinion as to why the committee had taken no action on CHA sites since June 1971 (Tr. 342), but added:

> "I don't think you could get, right now, an affirmative 26 votes [a majority of the council] to put that many housing units in white neighborhoods." (Tr. 343.)

A third alderman regretted that the committee hearings did not continue (Tr. 518), and said that the council did a "great disservice" by not continuing with them. Tr. 521. In a memorandum filed with the district court HUD called the "refusal" to hold further hearings "a deliberate affront to this [the district] court," and "totally contrary" to representations made by the city in a document signed by the city, CHA and HUD.*

6. An official of the city's Department of Development and Planning ("DDP") testified that he and his staff had examined most of the remaining CHA sites. Tr. 69-199. Contrary to petitioners' statement that these sites "were shown to be in violation of the city's zoning ordinance, or otherwise burdensome upon public services" (p. 6), the evidence showed that the DDP staff found over 100 of them to be "suitable sites in the General Public Housing Area." Pl. Ex. No. 8. (The relevant portion of Exhibit

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*Excerpts from the HUD memorandum are reproduced as Appendix B to this brief.

No. 8 is a part of the order appealed from. 342 F.Supp. 831-32; A27-28.)* However, neither this nor any other information concerning the remaining CHA proposed sites was submitted by the DDP to the Plan Commission, the agency to which the DDP normally made its recommendations. Tr. 266. No explanation was given as to why that had not been done. Tr. 197-99.

7. The order entered at the conclusion of the hearing and affirmed on appeal finds among other things: that acquisition of sites by CHA is necessary to enable CHA to comply with the 1969 judgment order to supply more dwelling units (342 F.Supp. at 828; A21); that under state law (Ill.Rev.Stat. ch. 67½, § 9) CHA may not acquire sites without city council approval (342 F.Supp. at 829; A21); that there was no showing of any necessity or reason for failure of the city council to take any action after June 1971 on CHA's proposed sites, particularly in light of the evidence that many of the sites were suitable for the provision of dwelling units (342 F.Supp. at 829; A22); and that such failure had had the effect of preventing CHA from complying with the 1969 judgment order and of preventing the Court from providing relief to which the plaintiffs were entitled. 342 F.Supp. at 829; A22. The order declares that until further order the statute requiring city council approval of CHA sites shall not be applicable to CHA's actions taken for the purpose of providing dwelling units (342 F.Supp. at 830; A23-24), and directs CHA to proceed with steps to provide the

* Of the remaining approximately 190 CHA sites, 148 had been reviewed by the DDP staff at the time of trial. No explanation was given as to why the other 42 had not been reviewed. Only 18 of the 148 reviewed sites were found by the DDP staff to be unsuitable for public housing. 342 F.Supp. at 832; A. 28.

1500 dwelling units that were the subject of the district court's earlier orders. 342 F.Supp. at 830-31; A24-26.

C. The Posture of the Parties

Appeals were taken by the city, the mayor, CHA and 39 of the 48 aldermanic defendants; they are the defendants who are now the petitioners. Five of the aldermanic defendants did not appeal, admitted all allegations of the supplemental complaint and took the position in the district court that they "fully support the efforts being made by the plaintiffs." Tr. 38. Four others likewise did not appeal. In addition, one of the petitioner-aldermen testified,

> "I would say that the Court enter an order that whether we have City Council approval or not, that we proceed . . . The prayer to by-pass the City Council is one for the Court's suggestion, and I do not quarrel with it . . ." Tr. 330-31.

HUD neither appealed nor petitioned this Court. In its answer to the supplemental complaint HUD said:

> "[HUD] suggests that the inclusion of the City of Chicago, Richard J. Daley, Mayor of the City of Chicago, and individual members of the City Council, as defendants herein, is appropriate to achieve just and equitable relief and urges this Court to enter such order or orders against the aforesaid defendants as this court deems just and equitable." Answer, Record Doc. No. 5, p. 3.

ARGUMENT

The petition argues, (1) that the Court of Appeals decision interprets the equal protection clause in a novel way that adversely effects national housing policy, (2) that the judgments below conflicts with *James* v. *Valtierra*, and (3) that it was procedurally improper to join the city, the mayor and the aldermen as parties-defendant and to grant the declaratory relief prayed for.* These arguments will be addressed in the order stated.

I. THE COURT OF APPEALS DECISION INVOLVES NO NOVEL INTERPRETATION OF THE EQUAL PROTECTION CLAUSE OR ADVERSE IMPACT ON NATIONAL HOUSING POLICY.

The petition says that the Court of Appeals has found in the equal protection clause a "new affirmative duty" of a municipality "to alleviate 'racial imbalance' in public housing sites." (p. 9.) In fact the judgments below represent nothing more than an application of the familiar principle that,

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*With the exception noted in the next sentence of this note, the only relief the district court's order grants "against" any party other than CHA is the declaratory relief contained in paragraph 2 of the ordering portion that frees CHA (until further order of the court) from the requirement of Ill.Rev.Stat. ch. 67-1/2, §9, that the city council approve its proposed sites. 342 F.Supp. at 830; 23-24. The city was ordered only to provide CHA with certain information (paragraphs 3A and 4A of the order), which it has already done; no point is made in the petition about that direction to the city. Mayor Daley was named a party defendant because under Illinois statutes he presides at city council meetings and has the power to vote under certain circumstances.

> "[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees." *North Carolina Board of Education* v. *Swann*, 402 U.S. 43, 45 (1971).

Petitioners' misleading characterization of the Court of Appeals opinions is made possible only by the omission of any reference to the key finding below (Findings G and H; 342 F.Supp. at 829; A 22) that by its unjustified and, indeed, unexplained refusal to take action on CHA sites, the city council was hindering the district court from providing constitutionally required relief.*

Instances of the application of the "hindering" principle to state statutes are not rare. In *Louisiana* v. *United States*, 380 U.S. 145 (1965), this Court, while declining to pass on the validity of a statutorily authorized voter-qualification test, 380 U.S. at 154 n.17, affirmed a district

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*Although the petition refers frequently to "benign considerations" assumed to lie behind the city council's inaction, on the record below this is the purest speculation. The city and the aldermen in fact declined to offer any evidence at all to explain that inaction, even though the burden was upon them to show the "supervening necessity" for it. *Crow* v. *Brown*, 332 F.Supp. 382, 392 (N.D.Ga. 1971), aff'd, 457 F.2d 788 (5th Cir. 1972).

That the district court's orders were frustrated by inaction rather than by affirmative conduct of the city council is of course of no moment. It is well established that inaction can frustrate as effectively as more positive conduct the implementation of remedial decrees, and the courts have routinely dealt with frustration that takes that form. See *Crow* v. *Brown*, *supra*, 332 F.Supp. at 391, 392; *Sisters of Providence* v. *City of Evanston*, 335 F.Supp. 396, 404-405 (N.D. Ill. 1972); *Banks* v. *Perk*, 341 F.Supp. 1175, 1180 (N.D. Ohio 1972); *Davis* v. *School District of City of Pontiac*, 309 F.Supp. 734, 741-42 (E.D. Mich. 1970), aff'd 443 F.2d 573 (6th Cir.), cert. denied, 404 U.S. 913 (1971); *Mahaley* v. *Cuyahoga Metropolitan Housing Authority*, 355 F.Supp. 1245, 1252-53 (N.D. Ohio 1973).

court order enjoining use of the test in 21 Louisiana parishes until past voter discrimination had been remedied. 380 U.S. at 154-55.

In *Haney* v. *County Board of Education of Sevier County,* 429 F.2d 364 (8th Cir. 1970), the remedy for school segregation required annexation of a school district and establishment of a new school board, both of which steps appeared to be blocked by a state law. The court said:

> "[R]egardless of the constitutionality of The Arkansas Quality Education Act, it in no way limits the equity power of a federal district court in fashioning a decree which will effectuate 'a completely non-racial school system in Sevier County.'" 429 F.2d at 368-69.

In *United States* v. *Greenwood Municipal Separate School District,* 406 F.2d 1086 (5th Cir. 1969), steps to desegregate a school faculty were not taken because of a mistaken view that state laws blocked the way. The court said:

> "[A] state law is invalid to the extent that it frustrates the implementation of a constitutional mandate." 406 F.2d at 1094.

Other cases cited by the district court similarly hold that local officials may be directed to ignore state law, or that actions taken or proposed to be taken under otherwise valid state laws may be enjoined, where such injunctions are necessary to remedy the effects of past discrimination. *United States* v. *State of Texas,* 321 F. Supp. 1043 (E.D. Texas 1970); *Burleson* v. *County Bd. of Election Commissioners,* 308 F.Supp. 352 (E.D. Ark. 1970). See also, *Taylor* v. *Coahoma County School Dis-*

trict, 330 F.Supp. 174 at 176, 183 (N.D. Miss., affd, 444 F.2d 221 (5th Cir. 1971)).*

The petition's argument about a novel interpretation of the equal protection clause thus ignores the existence in this case of state-imposed segregation and of the principle that to remedy such segregation federal courts may, if necessary, set aside state laws that are found to be hindering or obstructing their remedial efforts. When that fact and that principle are recognized, the judgment and opinions below are seen to fit comfortably within familiar equal protection doctrine. The City and its officials have had no affirmative duty to alleviate racial imbalance imposed upon them; they have simply been stopped from interfering with the district court's effort to provide constitutionally required relief in a situation in which they have offered no justification for their interference.**

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*Although some of the cases speak loosely of the invalidity of the state law the correct view is that, "The question of the law's validity never arises . . .; its disregard is directed as a matter of remedy alone, in order to undo the effects of proved unconstitutionally discriminatory acts." *Bradley* v. *School Board of Richmond, Virginia*, 324 F.Supp. 396, 400 (E.D. Va. 1971). And see *Louisiana, supra*. In any event, and regardless of the verbal formulation, a single judge may enter the appropriate "disregard" order; a three-judge court is not required. *Bradley, supra*, 324 F.Supp. at 400-401. See also, *Southern Alameda Spanish Speaking Organization* v. *City of Union City, Cal.*, 424 F.2d 291, 296, (9th Cir. 1970), and *Bradley* v. *Milliken*, 433 F.2d 897, 900 n.2 (6th Cir. 1970).

** It is equally plain that the "hindering" principle comes into operation when hindering is shown; there is no requirement that the state agency or official whose actions are shown to be hindering the vindication of federal constitutional guarantees also have committed an "independent" constitutional violation. State policy must give way when it operates to hinder vindication of federal

(footnote continued on page 13)

The petition also argues that the judgments below produce an adverse impact on national housing policy by making it more difficult to build public housing in inner city areas, and that "vast areas of the inner city must remain vacant" because of them. (p. 10). In fact, the April 1972 district court order that is the subject of the petition *removes* the obstacle (city council veto power) that has prevented public housing from being provided in all areas of the city, including the inner areas to which the petition refers.* Were the city as concerned about housing in the inner city at it professes, it would be supporting, not opposing, that order as a means of providing some of that housing expeditiously.**

(footnote continued from page 12)

constitutional guarantees whether or not, apart from the hindering effect, it would itself violate such guarantees. See, *e.g.*, *Louisiana* v. *United States*, *supra*, 380 U.S. 145, 154-55; *North Carolina Board of Education* v. *Swann*, *supra*, 402 U.S. 43, 45; *Wright* v. *Council of City of Emporia*, 407 U.S. 451, 460 (1972); and *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 489-90 (1972). See also the discussion in Part III, *infra*.

* The petition's argument is really directed to the underlying judgment order of July, 1969, not to the April, 1972, order that is the subject of the petition. But the 1969 order does *not* prohibit building in inner city areas. Under CHA's current 1500 unit reservation from HUD, 200 units of public housing may be provided in the Limited Public Housing Area. In addition, CHA has applied to HUD for another reservation of 3500 units, 875 of which may be located in the Limited Public Housing Area. Compare *Banks* v. *Perk*, *supra*, where the housing authority was enjoined from *any* more construction in black areas of Cleveland. 341 F. Supp. at 1185.

** No contention can be or has been made that the District Court's orders *cannot* be complied with. Although a city witness testified that approximately 75-80% of the vacant and residentially zoned land in the city is within the Limited Public Housing Area (Tr. 217), the same

(footnote continued on page 14)

Moreover, it is a false implication that if the 1969 judgment order were suddenly vacated the city and CHA could populate the inner city with new public housing projects without simultaneously providing public housing in white neighborhoods. No longer is it the 1969 order alone that stands in the way of a continuation of that past segregationist practice. A now-developed national policy, based in part on 1968 legislation which postdates the several statutes to which the petition refers, requires dispersal of public housing and would, independently of the 1969 order, preclude the build-in-the-inner-city-only course the city seems desirous of pursuing. The development of that national policy is traced in *Shannon* v. *HUD,* 436 F.2d 809, 816 (3rd Cir. 1970), and as respects public housing is succinctly summarized in *Crow* v. *Brown, supra*:

> "[B]oth by legislative act, and judicial decision, this nation is committed to a policy of balanced and dispersed public housing. [citations omitted] . . . [I]n the area of public housing local authorities can no more confine low income blacks to a compacted and segregated area than they can confine their children to segregated schools." *Crow* v. *Brown, supra,* 332 F.Supp. at 390.*

(footnote continued from page 13)
witness said that (even without regard to the city's major land development policy of rezoning land for housing—Pl. Ex. No. 9, p. 6) there were 1,914 parcels of vacant, residentially zoned land in the General Public Housing Area of the city, ranging in size from one lot to one block. Tr. 276.

* "If plaintiffs . . . had proved . . . that the AHA [Atlanta Housing Authority] . . . is still engaged in furthering racial concentration in Atlanta by promoting low-rent public housing in compacted areas and failing to promote low-rent public housing in dispersed areas . . ., plaintiffs would have had grounds for relief against AHA under the Equal Protection Clause." *Crow* v. *Brown, supra,* 332 F.Supp. at 394.

Affirming, the court of appeals, considered a past housing authority practice of locating 75% of public housing units in Atlanta's black neighborhoods and said:

> "This policy causes and perpetuates residential racial segregation." *Crow* v. *Brown, supra,* 457 F.2d at 790.

To the same effect is *Banks* v. *Perk, supra,* 341 F.Supp. at 1179-80, where the housing authority was "enjoined from planning *any* future public housing in Negro neighborhoods of the City of Cleveland." *Id.* at 1185 (emphasis added).

HUD has now promulgated so-called project selection criteria which reflect the national policy of dispersed public housing and would themselves preclude building public housing exclusively in racially impacted inner city areas.* At the hearing below the HUD criteria were called to the court's attention by the Assistant United States Attorney representing HUD:

> "It has been given the impression during the entire hearing that if your Honor does modify or alter his judgment order either to eliminate the ratio, three to one ratio, or the elimination of 700 units, that that will allow the City or CHA to submit proposals for approval and funding by HUD. The only comment we would have to make as far as that, your Honor, is to refer your Honor's attention to the comments accompanying the new Project Site Selection criteria, and I am quoting:

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* 37 Fed. Reg. 203 (January 7, 1972). Referring to these criteria the court in *Crow* v. *Brown* said:

> "[T]he policy of HUD requires that public housing be dispersed outside racially compacted areas . . . [T]he written instructions of . . . HUD . . . direct the building of public housing outside 'ghetto' areas." *Crow* v. *Brown, supra,* 332 F.Supp. at 391.

> 'A phrase has been added which permits building in areas of minority concentration *if there exists sufficient comparable opportunities for housing for minority families in the income range to be served by the proposed project outside of areas of minority concentration.* This is designed to assure that the building in minority areas goes forward *only after there truly exists housing opportunities for minorities elsewhere.* The phrase 'sufficient comparable opportunities' is designed to assure the housing available to minorities outside areas of minority concentration is *more than a token amount of so few units that there is in fact no true opportunity.* At the same time, this phrase is not tied to any rigid formula.'

"So, your Honor, the position of HUD is that its regulations would apply, even assuming your Honor abolished his order, those regulations would apply to any proposal by CHA or the City of Chicago for low or moderate income housing, and that's an impression we did not want to leave the Court with, that in effect if your Honor had just vacated the entire July 1969, order that that would in and of itself mean that the City could obtain the requisite housing that they think that they need. It has to comply with our regulations." (Tr. 496-98, emphasis added.)

CHA itself has called the requirement of the 1969 order that public housing be built throughout the city "a positive policy":

> "The judge ordered CHA to build 700 homes or apartments in white areas before any more could be built in black neighborhoods, and thereafter to build 3 units in white neighborhoods for every one built in non-white areas. Actually, *this is a positive policy* since there is a serious need for low income

housing in many areas of the City—for whites as well as blacks."*

The reasons for the "positive policy" embodied in the 1969 order are well known. CHA explains them this way:

> "So long as low-income families are put into the same areas, whether in high-rise or low-rise buildings, they will lack the networth of strong economic, social and educational institutions to take care of the problems of metropolitan living. Into these communities are packed a whole range of difficult conditions. Each problem of the community feeds upon the other, magnifying them all and frustrating programs designed to meet one part of the difficulty. The result is even larger welfare costs without any hope of permanent improvement." (CHA 1971 Annual Report, p. 5.)

It is thus clear that the decision of the Court of Appeals does not adversely affect national housing policy; the judgments below are fully consistent with it. Indeed, the administrator of that policy, HUD, not only declined to appeal the district court's order but, having called the city council's refusal to act an "affront," virtually counselled its entry.

II. THE JUDGMENTS BELOW DO NOT CONFLICT WITH JAMES V. VALTIERRA.

Part II of the petition (p. 15.) asserts that this case is "identical in all essential ways" with *James* v. *Valtierra*, 402 U.S. 137 (1971).

James and this case are fundamentally different, not identical: *James* involved establishing liability whereas

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* CHA's 1971 Annual Report, p. 10 (emphasis added). The report was filed with the district court on June 30, 1972, and portions are included as Appendix C to appellees' brief in the Court of Appeals.

this case involves providing relief for liability already established. In *James* the plaintiffs were seeking to *prove* racial discrimination (relying heavily and ultimately without success on the allegedly facially discriminatory nature of the California constitution's referendum provision); here, by the opinion and judgment order of 1969, racial discrimination has already been established and the issue is how to provide effective relief. (The Court of Appeals has twice in this case made a like observation about *James*. *See Gautreaux* v. *Romney*, 448 F.2d 731, 732 n. 2, and *Gautreaux* v. *Romney*, 480 F.2d 210, 215; A.11.)*

Of course, when liability has been finally established (as here but not in *James*) the court becomes obligated to provide constitutionally required relief. State policy that hinders that task must give way, as pointed out in Part I above. That principle was not called into play in *James* because the determination there was that federal constitutional guarantees had not been violated. But there is no doubt that once, as here, such a violation *has* been established, the "hindering" principle operates as well with respect to referendums as it does with respect to state policy that takes other forms. Thus, in *United States* v.

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* Even the Justices who dissented in *James* did not do so (as the petition itself observes, p. 14) on the ground of racial discrimination, Similarly, neither of the other referendum cases cited in the petition is a case in which racial discrimination had already been established and the issue was the nature of the relief to be provided. Indeed, one of the cases cited, while denying preliminary injunctive relief, said that if apart from motive the result of a referendum were shown to be discriminatory, "in our view a substantial constitutional question is presented." *Southern Alameda Spanish Speaking Organization* v. *City of Union City*, 424 F.2d 291, 295 (9th Cir. 1970).

Scotland Neck City Board of Education, supra, 407 U.S. 484, a referendum was invalidated because otherwise it "would have the effect of impeding the disestablishment of the dual school system that existed in Halifax County." 407 U.S. at 490.

There is no conflict between the judgments below and *James.*•

III. JOINING ADDITIONAL DEFENDANTS AND GRANTING DECLARATORY RELIEF WAS PROPER.

The argument in Part III of the petition rests on an erroneous implication that the city and the aldermen

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• There are other important distinctions between *James* and this case: the referendum involved in *James* is a "fundamental suffrage right" significantly different in historical context and application and presenting "quite a different constitutional ingredient" than "a *refusal* [of a city council] to take affirmative action." *Sisters of Providence* v. *City of Evanston, supra,* 335 F.Supp. 396, 403 (N.D. Ill. 1972, emphasis is the court's). In *Sisters of Providence* the court, upholding a claim that a city council's refusal to rezone property for the construction of low and moderate income housing constituted an equal protection violation, concluded that for these reasons, "the cases involving referendums . . . are a category unto themselves." *Ibid.*

The petition appears to argue that *James* and this case are alike because the evidence offered in each case to prove racial discrimination was similar: "Here, as in the referendum cases, intention to discriminate is predicated upon an assessment of public opinion." (p. 15.) The statement is incorrect. In this case proof of "a deliberate policy to separate the races" (296 F.Supp. at 914; A40) was based on testimonial evidence of practices and procedures that constituted sufficient proof of racial discrimination "either considered alone or in combination with the statistics." 296 F. Supp. at 913; A39. Proof of discrimination in this case was not rested, as the petition asserts, "upon an assessment of public opinion."

were improperly held "bound" by the 1969 judgment order to which they were not parties. The April 1972 order is based on the failure of the new defendants to act on CHA's sites subsequent to June, 1971, not on their pre-1969 conduct. The order, in finding that "such failure" of the city and the council violates the plaintiffs' rights and frustrates the court's remedial efforts, unambiguously refers to the post-June 1971 non-action alleged in the supplemental complaint, not to the pre-1969 conduct discussed in the 1969 opinion. (See Findings G and H of the April 1972 order, 342 F.Supp. at 829, A.22.)

There is also an implication that the district court acted against the new defendants pursuant to Rule 65(d) of the Federal Rules of Civil Procedure. (p. 17.) It is plain that there was no reliance upon Rule 65(d). The new defendants were added by an order entered pursuant to a motion under Federal Rules 15(d), 19 and 21. (Motion to Add Parties Defendant and to File Supplemental Complaint, and Order pursuant thereto, Record Docs. No. 1 and 3). The complaint was served and answers filed. The April 1972 order was entered only after a trial was thereafter had on issues framed by the supplemental complaint and answers.

The procedure is of course a familiar one. In *Wright* v. *Council of City of Emporia, supra*, 407 U.S. 451, the Emporia, Virginia, city council was added as a defendant by a 1969 supplemental complaint (407 U.S. at 458) to a 1965 school desegregation case (*Id.* at 455) in which relief had been granted against the local school board. *Ibid.* The supplemental complaint sought to prevent the council from exercising its powers under state law to create a separate city school system on the ground, as the district court ultimately found, that to do so would

constitute an impermissible frustration of its desegregation order. 407 U.S. at 458. Emporia argued that because it was a separate political jurisdiction, entitled under state law to establish its own school system, it could be enjoined only upon a finding either that the state law under which it was acting was unconstitutional, that its boundaries were drawn so as to exclude Negroes, or that racial imbalance alone violated the Constitution. *Id.* at 459. Affirming the injunction that prevented the city council from exercising its otherwise valid authority under state law to create the separate city school system, this Court said it "made no such findings," *ibid.*, but nonetheless concluded:

> "If the proposal would impede the dismantling of the dual system, then a district court, in the exercise of its remedial discretion, may enjoin it from being carried out." *Id.* at 460.

See also, *United States* v. *Scotland Neck City Board of Education, supra,* 407 U.S. at 489-90.

Other cases similarly involve joinder of local legislative bodies (city councils or county boards) at the relief stage of a case where necessary to effectuate remedial orders. For example, in *Griffin* v. *County School Board of Prince Edward County,* 377 U.S. 218 (1964), the county board of supervisors was joined by a 1961 supplemental complaint, 7 years after the determination of liability in litigation begun 10 years earlier. 377 U.S. at 220-21, 224, 227. The reason for joinder was that ordinances enacted by the county board (resulting in the closure of schools) were frustrating the desegregation of public schools. See *Allen* v. *County School Board of Prince Edward County,* 198 F.Supp. 497, 502-03 (D.C. Va. 1961). In remanding to the district court for still further relief this Court said:

"[T]he cause is remanded to the District Court with directions to enter a decree which will guarantee that these petitioners will get the kind of education that is given in the State's public schools. And, if it becomes necessary to add new parties to accomplish this end, the District Court is free to do so." 377 U.S. at 234.

CONCLUSION

It is over 4 years since CHA was first ordered to provide the unsegregated public housing opportunities that form the essential ingredient of relief in this case. A district court supervising a desegregation case has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. [citations omitted]" *Green* v. *School Board of New Kent County*, 391 U.S. 430, 438n.4 (1968). The obligation includes the duty to take account of changing factual situations and to employ whatever equitable remedial powers are necessary to assure "effectiveness" of the desegregation plan, *Davis* v. *School Comm'rs of Mobile County*, 402 U.S. 33, 37 (1971). to assure "that state-imposed segregation has been completely removed," "eliminated root and branch." *Green* v. *County School Board*, *supra*, 391 U.S. at 438, 439. To this end a district court "may and should consider the use of all available techniques . . ." *Davis*, *supra*, 402 U.S. at 37.

It is clear beyond cavil that to accomplish such remedial purposes the district court could order that new parties be joined. It is equally clear that state laws may not be relied upon to impede or frustrate the carrying out of such remedial orders.

In the circumstances of this case these principles clearly compelled the entry of the April 1972 order. That order conflicts with no decision of this Court or any Court of Appeals, and it is consistent with national housing policy. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

Northern District of Illinois, Eastern Division

Dorothy Gautreaux, et al., Plaintiffs, v. Chicago Housing Authority, a corporation, Clement E. Humphrey, Executive Director, Chicago Housing Authority, George W. Romney, Secretary, Department of Housing and Urban Development, Richard J. Daley, Mayor, City of Chicago, Fred B. Roti, et al, members of the City Council of the City of Chicago, and the City of Chicago, a municipal corporation, Defendants.	No. 66 C 1459 No. 66 C 1460 (Consolidated)

SUPPLEMENTAL COMPLAINT

Now come plaintiffs, by their attorneys, and for their supplemental complaint against defendants state as follows:

1. Defendant Richard J. Daley resides within and is Mayor of the City of Chicago, Under Section 3-11-14, Chapter 24, Illinois Revised Statutes, the Mayor of the City of Chicago presides at meetings of the City Council of the City of Chicago ("City Council") and has the power to vote at such meetings under certain circumstances.

2. Defendants Fred B. Roti, Tyrone T. Kenner, Claude W. B. Holman, Leon M. Despres, Eugene Sawyer, William

Cousins Jr., Alexander A. Adduci, Edward R. Vrdolyak, Michael A. Bilandic, Donald T. Swinarski, Casimir J. Staszcuk, Edward M. Burke, Francis X. Lawlor, Anna R. Langford, William H. Shannon, Edward J. Hines, Thomas F. Fitzpatrick, Clifford P. Kelley, Bennett M. Stewart, Frank D. Stemberk, Joseph Potempa, David Rhodes, Vito Marzullo, Stanley M. Zydlo, Eugene Ray, Jimmy L. Washington, Robert Biggs, Elmer R. Filippini, Thomas E. Keane, Terry M. Gabinski, Rex Sande, Wilson Frost, Casimir C. Laskowski, John F. Aiello, Thomas J. Casey, William J. Cullerton, Anthony C. Laurino, Seymour Simon, Edward T. Scholl, Burton F. Natarus, William S. Singer, Dick Simpson, Edwin P. Fifielski, Christopher B. Cohen, John J. Hoellen, Marilou Hedlund, Paul T. Wigoda, and Jack I. Sperling are all the duly elected and acting members of the City Council and reside in the City of Chicago.

3. Defendant City of Chicago ("City") is an Illinois municipal corporation having a population of more than 500,000 persons. The City Council is the governing body of the City.

4. On February 10, 1969, this Court issued its memorandum opinion in this cause. 296 F.Supp. 907.

5. On July 1, 1969, this Court entered its judgment order ("Judgment Order") in this cause. 304 F.Supp. 736.

6. On September 10, 1971, the Court of Appeals for the Seventh Circuit issued its opinion in this cause. 448 F.2d 731. Pursuant thereto this Court entered its order of December 23, 1971.

7. The Judgment Order provides, among other things, that the defendant Chicago Housing Authority ("CHA") shall

"use its best efforts to increase the supply of Dwelling Units as rapidly as possible in conformity with the provisions of this judgment order and shall take all steps necessary to that end . . ." (304 F.Supp. at 741.)

8. CHA's efforts to increase the supply of Dwelling Units as provided in the Judgment Order require CHA to acquire real property.

9. Section 9 of Chapter 67½, Illinois Revised Statutes, provides in part that no real property shall be acquired in a municipality having a population in excess of 500,000 by the housing authority within whose area of operation such municipality is located until the housing authority has advised the governing body of the municipality of the description of the real property proposed to be acquired and the governing body of the municipality has approved the acquisition thereof by the housing authority. Such provisions of said Section 9 are deemed by CHA to apply to its acquisitions of real property.

10. From July 1, 1969 until March 5, 1971, CHA did not advise the City Council of any real property proposed to be acquired by it for the purpose of increasing the supply of Dwelling Units in conformity with the Judgment Order.

11. On March 1, 1971, this Court entered an order directing CHA to advise the City Council on or before March 5, 1971, of real property proposed to be acquired by it for the purpose of providing not fewer than 1500 Dwelling Units in conformity with the Judgment Order. On March 5, 1971 CHA complied with such order and did so advise the City Council.

12. On January 3, 1972 this Court entered an order directing CHA to file certain plans with the Court on

or before January 18, February 2 and February 17, 1972, respectively. In its "Response" to paragraph 1 of such order, filed by CHA on January 18, 1972, CHA advised the Court as follows:

(a) In June, 1971, the City Council approved the acquisition by CHA of real property said by CHA to be suitable for the provision of 302 Dwelling Units in conformity with the Judgment Order; and

(b) Subject to the approval of the Department of Housing and Urban Development ("HUD") CHA proposes to acquire real property, the acquisition of which was so approved by the City Council in June, 1971, at 29 different locations, said to be suitable for the provision of 199 Dweling Units in conformity with the Judgment Order.

13. Since June, 1971, the City Council has not approved the acquisition by CHA of the any real property for the purpose of providing Dwelling Units in conformity with the Judgment Order.

14. Relying upon such lack of such approval and upon the provisions of Section 9, Chapter 67½, Illinois Revised Statutes, CHA has not acquired real property for the provision of Dwelling Units in conformity with the Judgment Order. Such failure by CHA to acquire real property for such purpose has the effect of denying to the plaintiffs the relief to which they are entitled under the Judgment Order and of preventing this Court from providing a full remedy for the violations of federal constitutional rights which this Court's memorandum opinion of February 10, 1969, found to have occurred.

15. Paragraph 2 of this Court's order of January 3, 1972, requires CHA to file with the Court on or before

February 2, 1972, a specific plan for the prompt acquisition by CHA, regardless of any action taken or not taken by the City Council, of such number of additional sites for Dwelling Units as will, when added to the sites approved by the City Council in June, 1971, permit CHA to provide the 1500 Dwelling Units referred to in this Court's order of March 1, 1971. Such order of January 3, 1972, further provides that a hearing for the consideration of such plan and the entry of further orders in connection therewith shall be held on February 17, 1972.

Wherefore, following such hearing on February 17, 1972, plaintiffs pray:

(a) for the entry of a declaratory judgment that under the circumstances set forth herein the effect of the operation of Section 9, Chapter 67-½, Illinois Revised Statutes, has been and is to deny plaintiffs the relief to which they are entitled under the Judgment Order and to prevent this Court from providing a full remedy for the violations of federal constitutional rights which the Court's memorandum opinion of February 10, 1969, found to have occurred;

(b) for the entry of an order directing CHA to acquire, regardless of any action taken or not taken by the City Council, such additional sites for Dwelling Units as are specified in CHA's plan therefor to be filed on February 2, 1972, subject to such modifications therein as may be appropriate in light of the evidence adduced at such hearing of February 17, 1972;

(c) for the entry of an order directing CHA to provide Dwelling Units on such additional sites as rapidly as possible; and

(d) for the entry of an order granting plaintiffs such other and further relief as the Court may deem just and equitable.

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APPENDIX B

(Excerpts from Memorandum Filed by HUD on November 23, 1971 in the District Court.)

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Dorothy Gautreaux, et al.,
Plaintiffs,
v.
George W. Romney, et al.,
Defendants.
No. 66 C 1460

MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE AND MOTION TO ALTER OR AMEND THE JUDGEMENT ORDER ENTERED NOVEMBER 11, 1971

An examination of the record in these cases reveals that the City of Chicago holds the key to any meaningful progress in redressing the racially discriminatory public housing program which has evolved over the last three decades in the City of Chicago. . . .

More recently, it has been the City of Chicago, through the City Council and the Committee on Planning and Housing, which has effectively blocked the consideration of approximately 190 of the 275 sites proposed for public housing and submitted by the Chicago Housing Authority for approval, pursuant to an order of this court entered March 1, 1971 in *Gautreaux* v. *Chicago Housing Authority.* To date, the Committee on Planning and Housing has held no public hearings on these 190 sites and has not even

scheduled such hearings. . . The refusal to hold public hearings and presenting the proposed sites to the City Council for consideration is a deliberate affront to this court and is totally contrary to the representations made by the City in the May 12, 1971 Letter of Intent, between the City of Chicago, the Chicago Housing Authority and the United States Department of Housing and Urban Development. Thus, if there is to be any real progress in the construction of low-rent family housing in the City of Chicago in conformity with the orders of this court it is essential that any further remedial order encompass the intervenor, the City of Chicago. . .

The veto power as exercised by the City Council of the City of Chicago over low cost housing sites has created a situation identical with that found in *Kennedy Park Homes Association* v. *City of Lackawanna, supra,* [436 F.2d 108 (2d Cir. 1970)] . . .

CONCLUSION

In order to achieve any real results in correcting the racially discriminatory public housing program in the City of Chicago both the City of Chicago and the Chicago Housing Authority must be actively participating with the Department of Housing and Urban Development. . .